

2011 WL 683988 (Ill.) (Appellate Brief)
Supreme Court of Illinois.

Thomas VINCENT, as Legal Representative of the Estate of Marjorie Vincent, deceased, Plaintiff-Appellant,
v.
ALDEN-PARK STRATHMOOR, INC., a corporation, Defendant-Appellee.

No. 110406.
January 4, 2011.

Appeal from the Appellate Court of Illinois, Second District, Appeal No. 2-09-0625
On Appeal from the Circuit Court for the 17th Judicial Circuit, Winnebago County, Illinois, Circuit No. 07 L 448
Trial Judge: Honorable Edward Prochaska

Plaintiff-Appellant's Reply Brief

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ORAL ARGUMENT REQUESTED

***1 ARGUMENT**

Defendant argues that the Nursing Home Care Act does not authorize punitive damages because the words “punitive damages” are not expressly stated in Section 3-603 of the Act. Yet, defendant's argument with regard to interpretation of the Nursing Home Care Act misses a fundamental requirement of statutory construction, which is to interpret its plain language in reference to the law's purpose and intent. The plain language of the Nursing Home Care Act was to protect the most infirm of our society, the **elderly**, whose needs require expansive remedial protection. The recognized vulnerability of the **elderly** and practical impossibility of stationing a public attorney general at every nursing facility necessitated a broader remedial scheme, including punitive damages, to protect the **elderly** from the most **abusive** form of misconduct by those facilities. The plain language of Section 3-603, read consistently, with the purpose of protecting the **elderly**, assures that no loophole will be created. To do so, the Nursing Home Care Act would leave the indisposed **elderly** subject to the most egregious behavior of nursing homes, to wit, reckless or intentional misconduct.

Statutory language that is clear and unambiguous will be given effect without resorting to other aids of construction. *Gem Electronics of Monmouth, Inc. V. Department of Revenue*, 183 Ill.2d 470, 475 (1998). Section 3-603 is clear and unambiguous, contrary to defendant's contention that the words “punitive damages” must be *explicitly* stated in order to be statutorily authorized. The definition of the word “relief is a legal remedy. *Merriam-Webster's Collegiate Dictionary* 988, (10th ed. 1998). Punitive damages, as a form *2 of relief, is a legal remedy. *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 362 (1986). Instead of listing all forms of relief or remedies under the Act, the legislature provided nursing home residents a right to maintain an action *under the Act* for all relief permitted by law. Consequently, punitive damages for wilful and wanton violations of the Act which cause injury is a remedy authorized by Section 3-603. Any other reading of this section would render the words “under the Act” a meaningless surplusage. Plaintiff's reading of the statute is consistent with this court's interpretation of Section 3-603. *Harris*, 111 Ill.2d at 363-364.

Further, courts will not depart from the plain language of the statute by reading in exceptions, limitations or conditions that conflict with the express legislative intent. *Barnett v. Zion Park District*, 171 Ill.2d 378, 379 (1996). Defendant's interpretation

of the statute impermissibly reads into it exceptions and limitations that are contrary to the legislative intent. Defendant argues that the legislature knows how to word a statute when it wants to provide the remedy of punitive damages, namely using the words “punitive damages.” Yet, the legislature is free to enact a statute consistent with its intent to provide the broadest possible remedies for protection of a class of persons most in need of remedial legislation from **abuse** and neglect. That's exactly what the legislature did in enacting Section 3-603.

Defendant's interpretation of the statute is contrary to legislative history and intent. The function of the courts in construing statutes is to ascertain and to effectuate the intent of the legislature. *Dornfeld v. Julian*, 104 Ill.2d 261, 266 (1984). In determining the intent of the legislature, the court examines the entire statute and seeks “to determine the objective the statute sought to accomplish and the evils it desired to remedy.” *Springfield v. Board of *3 Election Commissioners* 105 Ill.2d 336, 341 (1985). Here, the evils were clearly defined in the history of the Nursing Home Care Act and the recognition of the need to provide special protection for the **elderly**. The legislature, in writing Section 3-603, saw fit not to list each and every form of relief or remedy available under the Act, but rather exercised its prerogative to provide nursing home residents or their legal representatives with a right to maintain an action under the Act for all relief and remedies provided by law.

Courts also will avoid a construction of a statute that would render any portion of it meaningless or void. *People v. Tarlton*, 91 Ill.2d 1, 5 (1982); *People v. Lutz*, 73 Ill.2d 204, 212 (1978). To argue as defendant does that the legislature did not intend the right to maintain an action for punitive damages as a form of relief under Section 3-603 renders the Nursing Home Care Act meaningless with regard to protecting residents against reprehensible conduct which results in injuries that cause their death. To interpret Section 3-603 in such a way would, in effect, open up a crack that was carefully filled by the legislature and eliminate a potent weapon of punitive damages for the most outrageous of reckless behavior, which conduct happens to be the equivalent of a felony. 720 ILCS 5/12-19.

The wording of the statutes at issue in *Duncavage v. Allen*, 147 Ill.App.3d 88 (1986) and *Doe v. Chand*, 335 Ill. App.3d 809 (2002) is fundamentally different than that of Section 3-603. In *Duncavage*, at issue was whether the words in the Consumer Protection Act, that a court may award any relief which it deems proper, permitted punitive damages that survived the death of the aggrieved person. In *Doe*, at issue was whether the words “such other relief, including an injunction, as the court may deem appropriate” in the AIDS *4 Confidentiality Act permitted punitive damages under the Act. Both of these statutes authorized the court to award any other relief it deemed appropriate. This language was insufficient to conclude that the legislature authorized the right to punitive damages under those statutes. *Duncavage*, 147 Ill.App.3d at 103; *Doe*, 335 Ill.App.3d at 819.

Contrast the language in the above two statutes to Section 3-603, which provides a resident a right to maintain an action for any other type of relief under the Act provided by law. In *Duncavage* and *Doe*, the aggrieved persons were not given the right to maintain actions for punitive damages, but rather the court was authorized to award other relief, as appropriate.

Glazewski v. Coronet Insurance Company, 108 Ill. 2d 243 (1985) is distinguishable. Defendant cites this case as authority for the proposition that the wording of Section 3 of the Uniform Deceptive Trade Practices Act was found not to provide a remedy for any type of damages. Section 3 provided for injunctive relief, attorney fees and costs. Further, the statute provided, “The relief provided in this Section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this State.” After considering the history of the statute, this court concluded that the statute did not provide for damages. Section 3-603 of the Nursing Home Care Act is fundamentally different in that it grants the resident a right to maintain an action under the framework of the Act for any other type of relief provided by law. Further, for reasons previously discussed, the history and intent of the Nursing Home Care Act is different.

At pages 12 to 15 of its brief, defendant argues that the statements made by Senator Fawell and Representative Tenhouse during debate show that there was never any intention *5 that punitive damages remain a remedy under the Act after the repeal of treble damages. A fair reading of the debate shows otherwise. Senator Fawell's statements are set forth in the appellate court decision below. *Vincent v. Alden-Park Strathmoor, Inc.*, 399 Ill.App.3d 1102, 1111 (2nd Dist. 2010). Representative Tenhouse's statements are found at page 14 of defendant's brief. Although both legislators spoke in favor of the bill to eliminate this type of

monetary award of damages, they were clear in pointing out that punitive damages were not being eliminated. Punitive damages are broad in nature, whereas treble damages are specific. With respect to punitive damages, the jury is allowed, after listening to the evidence in the case, to assess damages based in part on the egregiousness of the wrong and the harm caused. [Illinois Pattern Jury Instructions: Civil, No. 35.01](#) (2009 Supplement).

Punitive damages are generally reserved for those cases of intentional or wilful and wanton misconduct which cause injury. The net effect of treble damages, however, was that nursing homes and/or their liability insurance companies were required to pay actual damages times three (before elimination) in 100% of all cases for each proven violation of the Act. Contrast that to the risk of punitive damages being awarded in civil jury trials for reprehensible conduct. In Illinois circuit courts, less than 1% of civil jury trials involve punitive damages even being submitted to a jury, regardless of the outcome. Perrecone & Fabiano, *The Federalization of Punitive Damages and the Effect on Illinois Law*, 28 N. ILL. U.L. Rev. 537, 548-549 (2008).

It is clear from the words spoken by Senator Fawell that the intent in eliminating treble damages was to level the playing field: a nursing home that *negligently* injures a resident should pay only actual damages, just like a doctor or hospital that *negligently* injures *6 a patient, not triple the amount. Thus, the elimination of treble damages would, in theory, increase the availability of insurance and reduce liability insurance rates. This is consistent with Senator Fawell's statements that the legislative intention was to reduce insurance rates and increase its availability by eliminating treble damages, but not to eliminate punitive damages, which, according to statistics, are rarely considered by a jury.

Further, if Senator Fawell was not speaking of punitive damages authorized by the Nursing Home Care Act, why would he have clearly pointed out, "The elimination of the mandatory provision in no way prevents a judge or jury from awarding punitive damages in any amount, even in excess of triple actual damages, if the actions of the nursing home or any of its employees or agents are deemed to be intentional or willful and wanton, or grossly negligent."? 89th Ill. Gen. Assem., Senate Proceedings, May 24, 1995 at 90. Absent statutory authorization, liability to pay punitive damages for the intentional or wilful/wanton acts of employees is not vicariously imputed to the employer unless the employer is complicit. [Kemmer v. Monsanto Company](#), 217 Ill.App.3d 188, 202-206 (5th Dist. 1991). Senator Fawell's statement indicates that nursing homes would be vicariously liable for punitive damages for intentional and reckless conduct of its employees. Under Section 3-601 of the Nursing Home Care Act, liability for conduct of a nursing home's employees, intentional or otherwise, is vicariously imputed to the owner or licensee. Therefore, it is evident that Senator Fawell was referring to punitive damages authorized by the Act. Even Representative Tenhouse pointed out that punitive damages were not being eliminated in the context that the Nursing Home Care Act made owners and licensees liable to a resident for intentional acts of their employees. 89th Ill. Gen. Assem., House of Representatives *7 Proceedings, May 23, 1995 at 30. Like Senator Fawell, it is clear he was speaking about imputed liability for statutorily authorized punitive damages. It would be highly unlikely that both legislators were misinformed about punitive damages having a statutory basis in light of their statements that nursing home owners could be sued for punitive damages for injuries caused by reprehensible conduct of their employees.

Although defendant disputes plaintiff's reading of *Harris*, *Dardeen* and *Eads*, plaintiff's interpretation of these cases is consistent with the plain language of Section 3-603 and the legislative intent as expressed by Senator Fawell and Representative Tenhouse. [Harris](#), 111 Ill.2d at 363-364, *Dardeen*, 186 Ill.2d at 300, and *Eads*, 204 Ill.2d at 104.

At pages 17-19 of defendant's brief, it argues that the legislature has switched approaches away from the private attorney general concept toward more regulatory requirements. Defendant attempts, by inference, to create a nexus between repeal of treble damages in 1995 and the passage of Public Act 96-1372 some fifteen years later. Yet, defendant fails to cite a source for its conclusion, such as legislative debate or other evidence of intent. Elimination of treble damages was not the demise of the private attorney general concept embraced by this court in *Harris*. Rather, repeal was a leveling of the playing field among health care providers with respect to paying only actual damages for negligent conduct. Certainly, it was not the intent of the legislature to take away existing rights of the **elderly** in passing more regulations. This, of course, would be inconsistent with the purpose and intent of the Act. If anything, passage of Public Act 96-1372 was an attempt by the legislature to provide more safeguards for the **elderly**.

*8 Defendant argues at page 29 of its brief that the Wrongful Death Act should be considered in determining whether plaintiff has compensable damages under the Survival Act for punitive damages to survive based on equitable considerations. However, the damages in a wrongful death action belong to certain family members. 740 ILCS 180/2. The cause of action does not belong to the deceased resident or consider the deceased resident's damages. 740 ILCS 180/2. Consequently, the resident receives no benefit from this Act. The purpose of the Wrongful Death Act is not to induce nursing homes to comply with the Nursing Home Care Act. *Wills v. DeKalb Area Retirement Center*, 175 Ill.App.3d 833, 842-843 (2nd Dist. 1988) (Nursing Home Care Act does not provide cause of action for wrongful death).

Furthermore, due to the age of the resident, there may be no living family members who would qualify for damages under the Wrongful Death Act. Or, they may not want to pursue lengthy and costly medical malpractice litigation against the nursing home. Also, the deceased resident may have had serious medical conditions that significantly reduced life expectancy, thereby making medical malpractice litigation via the Wrongful Death Act economically infeasible. Consequently, suggesting that a cause of action for wrongful death is the equivalent of a remedy under the Survival Act is misplaced.

***9 CONCLUSION**

For the reasons expressed herein and in plaintiff's initial brief, the certified question should be answered in the affirmative.

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